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Public Prosecutor v Shalima Bi

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–352–12 OF 2014 (MMR)
AZIAH ALI, MOHD ZAWAWI SALLEH AND ABDUL RAHMAN SEBLI JJCA
13 JANUARY 2016

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Criminal Procedure — Judge — Role of trial judge — Whether trial judge failed to consider all evidence adduced before him at conclusion of trial — Whether trial judge gave undue weight to opinion of medical witness in upholding accused's defence of insanity on murder charge — Whether opinion of medical witness not tested against prosecution's witness of fact who was at scene of crime — Whether trial judge applied wrong burden of proof to defence of insanity — Whether trial judge wrong to have considered accused's bizarre behaviour during trial as proof she was insane — Whether evidence showed accused had motive to commit the murder thus negating defence of insanity — Criminal Procedure Code, s 182A(1)

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The respondent, who was the second wife of a Muslim man ('Kassim'), was charged in the High Court with murdering Kassim's first wife ('the deceased') by pouring hot oil over her. The incident happened shortly after midnight several days after the deceased, her son and two daughters (one of whom, SP2, was the prosecution's main witness) came from Myanmar to stay in Kassim's house. The respondent was already staying with Kassim at the time. SP2 testified that while she was watching television before going to bed and the deceased was sleeping in her room and Kassim had gone out, the respondent asked her where her parents were. Thereafter, after SP2 went to sleep, she was rudely awakened by the screams of the deceased who ran into SP2's room covered in oil and blood. The deceased told SP2 the respondent had poured hot oil over her. SP2 said when she went out of the room, she saw the respondent holding a knife and she threatened to kill SP2 and her siblings if they made noise. SP2 ran back into her room and locked the door and opened it only when Kassim returned home by which time the respondent had left the house, apparently by the back door. The deceased died shortly after admission to hospital of multi-organ failure due to severe burns. The respondent, who testified under oath, relied on the defence of insanity and claimed she was 'mad' at the material time because she had not taken her prescribed medication. Her witness, a forensic psychiatrist ('SD2') testified that the respondent had been undergoing treatment for depression and psychosis and suffered from a condition called borderline personality disorder ('BPD') – a personality disorder with intervals when she was normal – and that she did not suffer from any major mental illness. SD2 had certified the respondent fit to stand trial.

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Relying heavily upon SD2's evidence and the respondent's at-times bizarre behaviour in court during the trial, the trial judge ruled that due to unsoundness of mind the respondent did not know that her act of pouring the hot oil on the deceased was wrong. He upheld the defence of insanity, acquitted and discharged the respondent of the charge and ordered her to be detained in hospital for treatment. In the instant appeal against the decision, the prosecution argued that the trial court was wrong to hold that the respondent was legally insane at the time she committed the crime.

Held, allowing the appeal, setting aside the decision of the High Court, convicting the respondent on the charge of murder and sentencing her to death:

(1) The trial judge failed to consider all the relevant and material evidence and his finding, based on SD2's oral evidence and report, that at the time the respondent poured the hot oil on the deceased she did not know the consequences of her act, was grossly against the weight of the evidence. The trial judge accepted SD2's evidence without question and without testing it against any of the evidence led by the prosecution. In short, he failed to comply with the requirements of s 182A(1) of the Criminal Procedure Code. He failed to appreciate that it was for him, and not for SD2 or any other medical expert no matter how eminent, to determine whether the respondent was insane at the time she committed the act. SD2's role was merely to assist the court in arriving at a decision and no more (see paras 38–41).

(2) SD2 testified that the respondent suffered more of a personality disorder bordering on insanity rather than insanity and that there were times when the respondent was mentally stable and times when she was not. This important piece of evidence tended to show that the respondent was not even medically insane, let alone legally insane. Paragraph 5 of SD2's report was particularly relevant to the issue of insanity and was the clearest evidence of motive on the respondent's part. It was hard evidence that she was envious of the attention her husband was giving to the deceased. Motive would negate the defence of insanity. Yet the trial judge glossed over this part of the evidence without giving it the proper consideration it deserved (see paras 29–30 & 36–37).

(3) The trial judge failed to test SD2's opinion evidence against SP2's factual evidence. The strands of circumstantial evidence in SP2's testimony clearly and undoubtedly showed motive and intention on the respondent's part, thus negating her defence of insanity. The trial judge was duty-bound to have considered these strands of circumstantial evidence before accepting SD2's opinion wholesale. Where there was conflict between the evidence of a witness of fact and a witness of opinion, the evidence of a witness of fact must, as a general rule, be given

more weight. SP2 was at the scene of the crime. SD2 was not and she could not even confirm if the respondent was suffering from BPD at the time she committed the act (see paras 42–43 & 45).

(4) The trial judge's ruling that the respondent was only required to cast a reasonable doubt in the prosecution's case to succeed on the defence of insanity was a clear and serious misdirection on the burden of proof rendering the whole judgment defective and liable to be set aside. It was trite law that an accused had to prove the defence of insanity on balance of probabilities. It was for the respondent to prove she was legally insane at the time she committed the act and not for the prosecution to prove the reverse. Had the trial judge properly and adequately directed his mind to all the relevant evidence adduced, he would have found that the respondent had failed to prove the defence of insanity on balance of probabilities (see paras 56–59).

(5) The trial judge erred in law when he considered the respondent's behaviour in court during the trial as proof that she was insane. What he had to determine was whether she was insane at the time she committed the act. How she behaved or conducted herself in court during trial or at any other time had nothing to do with that question. The respondent was certified fit to stand trial. The record did not show she had created any scene while giving evidence. She testified without any difficulty and answered questions intelligently. Neither did she behave abnormally throughout the proceedings in this appeal (see paras 46–49).

(6) In determining the defence of insanity, once it was established, through the aid of expert medical evidence, that an accused was medically insane at the time he committed the act, the next step was for the trial judge to consider whether by reason of the medical insanity the accused was incapable of knowing the nature of his act or that what he was doing was either wrong or contrary to law. Expert medical evidence was irrelevant to determine this question as it was a matter to be inferred from the proved facts and circumstances and not from expert medical opinion. It was purely a question of fact for the trial judge to determine. By focusing his mind on SD2's expert opinion and ignoring completely SP2's factual evidence as to the circumstances that led to her mother's death, the trial judge fell into a serious error of law that warranted appellate intervention (see paras 53–55).

[Bahasa Malaysia summary

Responden, yang merupakan isteri kedua seorang lelaki Muslim ('Kassim'), telah didakwa di Mahkamah Tinggi kerana membunuh isteri pertama Kassim ('si mati') dengan mencurah minyak panas ke atasnya. Kejadian itu berlaku sejurus selepas tengah malam beberapa hari selepas si mati, anak lelaki dan dua anak perempuannya (salah seorang yang mana, SP2, merupakan saksi utama

pendakwaan) telah datang daripada Myanmar untuk tinggal di rumah Kassim. Responden telah pun tinggal dengan Kassim pada masa itu. SP2 telah memberi keterangan bahawa semasa dia menonton televisyen sebelum tidur dan si mati sedang tidur dalam biliknya dan Kassim telah keluar, responden telah bertanya kepadanya di mana ibubapanya. Berikutan itu, selepas SP2 pergi tidur, dia dikejutkan oleh jeritan si mati yang lari masuk ke bilik SP2 berlumuran minyak dan darah. Si mati telah memberitahu SP2 yang responden telah mencurah minyak panas ke atasnya. SP2 mengatakan apabila dia keluar dari bilik itu, dia melihat responden memegang pisau dan dia mengugut untuk membunuh SP2 dan adik-beradiknya jika mereka membuat bising. SP2 lari balik ke dalam biliknya dan mengunci pintu dan hanya membukanya apabila Kassim pulang ke rumah yang mana masa itu responden telah meninggalkan rumah itu, nampaknya melalui pintu belakang. Si mati telah meninggal dunia sejurus selepas dimasukkan ke hospital akibat kegagalan pelbagai organ dan luka terbakar yang teruk. Responden, yang memberi keterangan bersumpah, bergantung kepada pembelaan hilang akal dan mendakwa dia 'mad' pada masa matan kerana dia tidak mengambil ubat yang ditetapkan. Saksinya, pakar psikiatri forensik ('SD2') memberi keterangan bahawa responden telah menjalani rawatan untuk kemurungan dan psikosis dan mengalami keadaan yang dipanggil *borderline personality disorder* ('BPD') – gangguan personaliti ada ketika dia biasa – dan bahawa dia tidak mengalami apa-apa penyakit mental yang serius. SD2 telah mengesahkan responden berupaya untuk dibicarakan. Berdasarkan keterangan SD2 dan kelakuan responden yang ada kalanya pelik di mahkamah sepanjang perbicaraan, hakim perbicaraan memutuskan bahawa akibat hilang akal responden tidak mengetahui bahawa tindakannya mencurah minyak panas ke atas si mati adalah salah. Dia mengekalkan pembelaan hilang akal, melepas dan membebaskan responden daripada pertuduhan dan memerintahkanya ditahan di hospital untuk rawatan. Dalam rayuan ini terhadap keputusan itu, pendakwaan berhujah bahawa perbicaraan mahkamah adalah salah untuk memutuskan bahawa responden tidak siuman dari segi undang-undang pada masa dia melakukan jenayah itu.

Diputuskan, membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi, mensabitkan responden atas dakwaan membunuh dan menjatuhkan hukuman mati:

(1) Hakim perbicaraan telah gagal mempertimbangkan semua keterangan yang relevan dan penting dan penemuan beliau, berdasarkan keterangan lisan dan laporan SD2, bahawa pada masa responden mencurah minyak panas ke atas si mati dia tidak mengetahui akibat tindakannya, adalah amat bertentangan dengan beban keterangan. Hakim perbicaraan telah menerima keterangan SD2 tanpa persoalan dan tanpa mengujinya dengan mana-mana keterangan yang dikemukakan oleh pendakwaan. Pendek kata, beliau telah gagal mematuhi keperluan s 182A(1) Kanun

A Tatacara Jenayah. Beliau telah gagal memahami bahawa ia adalahnya, dan bukan SD2 atau mana-mana pakar perubatan lain tidak kira betapa terkenal, untuk menentukan sama ada responden tidak siuman pada masa dia melakukan tindakan itu. Peranan SD2 hanya untuk membantu mahkamah untuk membuat keputusan dan tidak lebih daripada itu (lihat perenggan 38–41).

(2) SD2 memberi keterangan bahawa responden telah mengalami lebih kepada gangguan personaliti yang hampir kepada ketidaksiuman dan bukan ketidaksiuman dan bahawa ada ketikanya responden adalah stabil dari segi mental dan ada masa apabila dia tidak. Ini adalah keterangan penting yang bertujuan untuk menunjukkan responden dari segi perbuatan bukan tidak siuman, apatah lagi tidak siuman dari segi undang-undang. Perenggan 5 laporan SD2 terutamanya relevan kepada isu ketidaksiuman dan merupakan keterangan paling jelas tentang motif di pihak responden. Ia merupakan keterangan kukuh bahawa dia iri hati dengan perhatian yang diberikan oleh suaminya kepada si mati. Motif akan menafikan pembelaan tidak siuman. Malah hakim perbicaraan hanya melihat seimbas lalu bahagian keterangan ini tanpa memberikannya pertimbangan yang sewajarnya (lihat perenggan 29–30 & 36–37).

(3) Hakim perbicaraan telah gagal untuk menguji keterangan pendapat SD2 terhadap keterangan faktual SP2. Cebisan keterangan mengikut keadaan dalam keterangan SP2 yang jelas dan tidak diragui menunjukkan motif dan niat di pihak responden, oleh itu menafikan pembelaan ketidaksiumannya. Hakim perbicaraan adalah terikat dengan kewajipan untuk mempertimbangkan cebisan keterangan mengikut keadaan sebelum menerima secara menyeluruh pendapat SD2. Di mana ada konflik antara keterangan saksi mengenai fakta dan saksi mengenai pendapat, keterangan saksi mengenai fakta mesti, sebagai rukun am, diberikan beban lebih. SP2 berada di tempat kejadian. SD2 malahan tidak dapat pun mengesahkan jika responden mengalami BPD pada masa dia melakukan tindakan itu (lihat perenggan 42–43 & 45).

(4) Keputusan hakim perbicaraan bahawa responden hanya dikehendaki menimbulkan keraguan munasabah dalam kes pendakwaan untuk berjaya dalam pembelaan tidak siuman adalah satu salah arah yang jelas dan serius mengenai beban bukti dan menyebabkan keseluruhan penghakiman defektif dan boleh diketepikan. Ia adalah undang-undang nyata bahawa tertuduh perlu membuktikan pembelaan tidak siuman atas imbangan kebarangkalian. Ia adalah untuk responden membuktikan dia tidak siuman dari segi undang-undang pada masa dia melakukan tindakan itu dan bukan untuk pendakwaan untuk membuktikan sebaliknya. Jika hakim perbicaraan telah sewajarnya dan secukupnya mengarahkan mindanya kepada semua keterangan relevan yang

dikemukakan, beliau pasti mendapati bahawa responden telah gagal untuk membuktikan pembelaan tidak siuman atas imbangan kebarangkalian (lihat 56–59).

(5) Hakim perbicaraan terkhilaf dari segi undang-undang apabila beliau mempertimbangkan kelakuan responden dalam mahkamah semasa perbicaraan sebagai bukti yang dia tidak siuman. Apa yang perlu ditentukan oleh beliau adalah sama ada dia tidak siuman pada masa dia melakukan perbuatan itu. Bagaimana dia berkelakuan atau bersikap semasa dalam mahkamah sepanjang perbicaraan atau pada masa lain tiada kaitan dengan persoalan tersebut. Responden disahkan sihat untuk menjalani perbicaraan. Rekod tidak menunjukkan dia mereka apa-apa kejadian semasa memberikan keterangan. Dia telah memberi keterangan tanpa apa-apa kesukaran dan menjawab soalan dengan bijak. Malah dia tidak berkelakuan tidak normal sepanjang prosiding dalam rayuan ini (lihat perenggan 46–49).

(6) Dalam menentukan pembelaan tidak siuman, setelah ia dibuktikan, melalui bantuan keterangan pakar perubatan, bahawa tertuduh tidak siuman dari segi perubatan pada masa dia melakukan perbuatan itu, langkah seterusnya adalah untuk hakim perbicaraan mempertimbangkan sama ada berdasarkan sebab ketidaksiuman dari segi perubatan yang tertuduh tidak berupaya untuk mengetahui sifat perbuatannya atau bahawa apa yang dilakukannya adalah sama ada salah atau bertentangan dengan undang-undang. Keterangan pakar perubatan tidak relevan untuk menentukan persoalan ini kerana ia adalah perkara yang perlu disimpulkan daripada fakta dan keadaan yang dibuktikan dan bukan daripada pendapat pakar perubatan. Ia sekadar persoalan fakta untuk hakim perbicaraan untuk menentukan. Dengan memfokuskan minda beliau kepada pendapat pakat SD2 dan tidak menghiraukan langsung keterangan faktual SP2 berhubung keadaan yang membawa kepada kematian ibunya, hakim perbicaraan telah melakukan kekhilafan undang-undang serius yang mewajarkan campur tangan rayuan (lihat perenggan 53–55).]

Notes

For cases on role of trial judge, see 5(2) *Mallal's Digest* (5th Ed, 2015) paras 2621–2625.

Cases referred to

Goh Yoke v PP [1970] 1 MLJ 63, FC (refd)

A *Mat v PP* [1963] 1 MLJ 263; [1963] 1 LNS 82 (not folld)
Rajagopal v PP [1977] 1 MLJ 6, FC (refd)

Legislation referred to

Criminal Procedure Code ss 182A(1), 348(1)
B Penal Code s 84

Appeal from: Criminal Trial No 45B-15 of 2011 (High Court, Johor Bahru)

Samihah bt Rhazali (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
C *K Sandrasegaran (Tay, Bernard & Cheong) for the respondent.*

Abdul Rahman Sebli JCA:

D THE CHARGE

[1] The respondent was charged in the High Court at Johor Bahru with murder and the charge against her was as follows:

> Bahawa kamu pada 2 Februari 2011, jam lebih kurang 1.30 pagi, di rumah No. 27,
E Jalan Kulai Besar, Taman Seraya, dalam Daerah Kulaijaya, di dalam Negeri Johor Darul Ta'zim, telah membunuh seorang perempuan bernama Garanurharba bt Abdul Shukur (N. Passport: Tiada) dan oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

F **[2]** She was alleged to have poured hot oil on the deceased, causing her death. She claimed trial to the charge and was acquitted and discharged at the close of the prosecution case without her defence being called. The learned trial judge found that no prima facie case had been established against her as she was insane at the time she committed the act.

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[3] Dissatisfied with the decision, the prosecution appealed to the Court of Appeal and succeeded, whereupon the respondent was ordered to enter her defence before the same judge. The learned judge after duly calling for her defence again acquitted and discharged her, on the same ground that she was
H insane at the time she committed the act. Pursuant to s 348(1) of the Criminal Procedure Code ('the CPC'), he ordered the respondent to be detained at the Tampoi Hospital Johor Bahru for treatment.

THE APPEAL

I

[4] Having heard arguments from both sides, we unanimously allowed the prosecution's appeal, convicted her of the offence charged and sentenced her to death. My learned sister Aziah Ali JCA and my learned brother Mohd Zawawi Salleh JCA have read the final draft of this judgment and have approved the same. These then are our grounds for allowing the appeal.

[5] There is only one issue before us in this appeal and that is whether the learned judge was right in law and on the facts in finding that the respondent had proved her defence of insanity under s 84 of the Penal Code ('the Code'), which provides as follows:

> 84 Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

[6] The prosecution conceded that the respondent was medically insane but disputed the learned judge's finding that she was legally insane at the time she committed the act. The basis of the learned judge's finding is encapsulated in the following three paragraphs of his judgment at p 42 of the appeal record:

> Oleh itu saya memutuskan bahawa OKT tidak bersalah di atas pertuduhan membunuh si mati atas sebab ketidakwarasan mental serta tidak berupaya memahami tentang akibat dari setiap perbuatan yang beliau lakukan. Hakikat OKT yang telah menyebabkan kecederaan kepada si mati sehingga si mati menemui ajalnya itu, tidak dinafikan.
>
> Oleh sebab ketidakwarasan mental, OKT tidak memahami akan perbuatan beliau hingga menyebabkan kematian si mati adalah salah dan menyalahi undang-undang.
>
> Pihak pembelaan telah berjaya membuktikan pembelaan 'insanity' dalam kes ini. OKT memang tidak waras. Di dalam situasi sedemikian, di bawah s 347 Kanun Prosedur Jenayah ('KPJ'), OKT perlu dilepaskan dari pertuduhan.

[7] It was a reaffirmation of the reasons he gave in acquitting the respondent at the close of the prosecution case, where he had said at p 25 of the appeal record:

> Dari apa yang dinyatakan di atas, suatu hakikat yang tidak dapat dinafikan ialah OKT ini sememangnya bukanlah seorang yang waras. Selain dari laporan Dr. Badiah di D29, kelakuan dan perangai OKT semasa perbicaraan berlangsung, sudah terang lagi bersuluh, dia memang seorang tidak waras.
>
> Tertuduh sememangnya tidak boleh membuat pertimbangan yang sewajarnya dan tidak memahami tentang akibat dari setiap perbuatan yang dilakukannya. Oleh sebab ketidakwarasan mental, tertuduh sudah pasti tidak memahami akan akibat perbuatan beliau hingga menyebabkan kematian simati, salah dan menyalahi dari segi undang-undang.

A THE FACTS

[8] The evidence led by the prosecution was as follows. The respondent is the second wife of Muhammad Kassim bin Abu Hussein ('Kassim') whilst the deceased was his first wife. Prior to marrying Kassim, the respondent was married to another man by the name of Karim who had since re-married to an Indonesian girl. Kassim was not called as a witness by either side.

[9] On the date of the incident, the deceased and her two daughters and a son had just joined Kassim in their matrimonial home at Kulaijaya, Johor for about a week after arriving from Myanmar. The respondent was already staying with Kassim at the time.

[10] The prosecution's main evidence came from the deceased's daughter Nur Aisyah bt Muhammad Kassim ('SP2'). Her testimony was that while she was watching television at about 12 midnight, the respondent asked her where her father was. SP2 told the respondent he had gone out. Then the respondent asked where her mother was to which SP2 replied her mother was sleeping in her bedroom. SP2 then went to bed.

[11] While she was sleeping, SP2 was rudely awakened by the loud scream of her mother who came running into her room. Her body was covered with oil and blood and she was in great pain. Oil had also entered her mouth. SP2 asked her mother what happened and the deceased told her that the respondent had poured hot oil on her as she was returning to her room after going to the toilet. SP2 lifted the deceased and placed her on the pillow and changed her *sarong*. Her two siblings who by then had come over to her room were crying in front of the deceased.

[12] SP2 went out of her room to check out what was going on outside and there she saw the respondent standing near the cupboard. She was holding a knife and threatened to kill SP2 and her siblings if they continued to make noise. According to SP2, the respondent's eyes were very red and her hair was disheveled. SP2 became very scared and got back into her room and locked the door from inside.

[13] About five minutes later, Kassim arrived home and knocked on SP2's door. On opening the door, he was shocked to see the condition of his wife. After being told by SP2 as to what happened, he hurriedly left the house on a motorcycle and proceeded to his married daughter's house at Saleng to inform her of the fate that had befallen her mother.

[14] SP2's evidence was that after her father had arrived home after the attack, the respondent was nowhere to be seen in the house. Apparently she had left through the back door as the door was ajar.

[15] Medical evidence shows that the deceased suffered burns on her face, body, and both upper and lower limbs. Dr Omar bin Sulaiman (SP1) who attended to the deceased after her admission testified that her face alone suffered more than 90% burns. He testified that the deceased's rate of survival was 'very-very low'. According to him, the deceased was in the intensive care unit of the hospital for only a few hours before she died.

[16] Dr Rohayu bt Shahar Adnan (SP15), the pathologist who performed the post mortem on the deceased's body testified that the deceased suffered 48% burns involving her face, chest, body and both upper and lower limbs. She considered the injuries to be major burns and the deceased had a slim chance of survival. She determined the cause of death to be 'Multi organ failure due to major burn'. Graphic evidence of the injuries sustained by the deceased can be seen in the photos at exh P4.

THE DEFENCE CASE

[17] When called upon to state her defence, the respondent chose to give evidence on oath. Her testimony was that she was 'gila' at the time of the incident because she did not take her medicine as it was out of stock. She said she was depressed, having a headache and could not remember anything about what happened.

[18] That was about all there was to her defence. We must say that her evidence as elicited through examination-in-chief shows precious little as to her state of mind at the time she committed the act. In fact, her evidence established nothing towards proving insanity. Her self proclamation that she was 'gila' at the material time is not such evidence. It was in the cross-examination that she revealed much more.

[19] Under cross-examination by the learned DPP, the respondent at first admitted pouring hot oil on the deceased. Then she resiled from the admission and denied she ever did that. She said it was the deceased who wanted to pour hot oil on her, and that to protect herself she pushed the deceased away, causing her to fall flat on her buttocks.

[20] It was then according to her that the hot oil from the rice cooker that the deceased was holding spilled onto her body. She further alleged that it was the

A deceased who boiled the oil and not her. Asked why she left the house after the incident, she said it was because she was afraid that her husband might scold her.

B **[21]** From the respondent's testimony under cross-examination, it appears that her defence was a defence of misfortune rather than a defence of insanity under s 84 of the Code. We say so because the respondent's case was that the hot oil had spilled on the deceased's body by accident when she was trying to defend herself and not because she poured it on the deceased.

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[22] We must mention however that it was the learned judge's finding of fact that the respondent had intentionally poured the hot oil on the deceased except that she did not know that what she was doing was wrong due to unsoundness of mind. It is not the respondent's case both in the court below and before us
D that the hot oil incident was a misfortune. The issue all along had been whether the respondent was insane at the time she committed the act.

[23] Even if misfortune is in issue, on the facts, we do not think that any reasonable trier of fact would have come to any finding other than to find that
E the respondent's act was deliberate. Her evidence on this point was contradictory and totally irreconcilable and was never explained in re-examination. The fact that the deceased suffered more than 90% burns on her face alone dispels any notion that it was an accident. Further, the
F respondent's act of threatening to kill SP2 and her siblings after the incident is not consistent with her claim of misfortune.

[24] The defence called a forensic psychiatrist in the person of Dr Badi'ah bt Yahya ('SD2') to support the respondent's defence of insanity. She testified that
G based on her record at Permai Hospital Johor Bahru, the respondent was first admitted to the hospital on 21 November 2004. She was suffering from depression and psychosis and was discharged on 25 February 2005.

[25] The respondent was admitted for the second time on 29 February 2007
H and discharged on 29 March 2007. On this occasion, she was given electro convulsive therapy as she was suffering from severe depression and was at high risk of suicide. It was the same mental illness, ie depression and psychosis.

I **[26]** The respondent's third admission was on 7 January 2008 and discharged on 24 January 2008. Her last admission was on 21 November 2008 and discharged on 24 November 2008. According to SD2, the last time she attended to the respondent was on 10 August 2010, where the respondent was given outpatient treatment.

EXPERT OPINION

[27] SD2's expert evidence was that the respondent was suffering from borderline personality disorder ('BPD'), which she explained to mean the respondent was emotionally unstable, impulsive and had difficulty having relationship with other people.

[28] The part of SD2's evidence that stands out is her opinion that by reason of the BPD, the respondent was not only unable to control her emotion but was also unable to control and think of the consequences of her action when she poured the hot oil on the deceased. In other words, the respondent did not know that by pouring hot oil on the deceased, she could cause harm to her.

[29] SD2, however, agreed with the learned DPP that BPD is a form of medical insanity. She further confirmed that the respondent was not suffering from any major mental illness such as schizophrenia or bipolar disorder. According to her, it was more of a personality disorder bordering on insanity rather than insanity.

[30] This is an important piece of evidence as it tends to show that the respondent was not even medically insane, let alone legally insane. The BPD that the respondent was suffering from was not even a major mental illness. It was only a personality disorder. SD2 also agreed that there were times when the respondent was mentally stable and there were times when she was not.

[31] She further agreed that when the respondent was mentally stable, she would be able to think rationally. When asked if a person suffering from BPD is capable of lying, SD2 answered in the affirmative. If so, it would mean that even if the respondent was suffering from BPD at the time she committed the act, she would still be able to distinguish between what was right and what was wrong.

[32] SD2 was asked to confirm if the respondent would be able to know the consequences of her actions when she was sober. She answered in the affirmative. However, when asked how she knew that the respondent was suffering from BPD at the time she poured the hot oil on the deceased, SD2 evaded the question by volunteering the following explanation:

> SD2: BPD adalah sejenis kecelaruan personality yang telah bermula sejak daripada remaja. Ini boleh dibuktikan dimana perkahwinan penama sentiasa tidak bertahan lama. Seterusnya penama juga mempunyai sejarah ibu dan adik lelaki mengidap penyakit jiwa. Dibesarkan oleh ibu yang mengalami penyakit jiwa boleh mendedahkan seseorang itu mendapat kecelaruan personality yang kita panggil borderline personality disorder. Penama juga sering bersikap repulsive dan semasa

A di dalam hospital sendiri impulsivity ini kadang kala ketara di mana penama pernah mencurahkan air kopi yang panas kepada pesakit lain tanpa memikirkan akibat perbuatan yang dilakukannya.

B **[33]** It is obvious that SD2 was unable to confirm if the respondent was suffering from BPD at the time she committed the act. She even got it wrong on at least one matter. She said the respondent's marriages 'sentiasa tidak bertahan lama' when the evidence shows that her marriage to Kassim was only her second, and she is still married to him as far as the evidence on record goes.

C **[34]** Asked why the respondent poured hot coffee on the patient, SD2 said it was because she was very angry with the patient. This conduct, even if true, is not proof that the respondent was incapable of knowing the nature of her act or that what she was doing was either wrong or contrary to law.

D **[35]** What that evidence shows is that the respondent's act of pouring hot coffee on the patient was motivated by anger and not due to unsoundness of mind. In any event, what SD2 said was that the respondent did not even bother to think of the consequences of her act. Now, this is very different from saying E that the respondent was incapable of knowing the nature of her act or that what she was doing was either wrong or contrary to law.

[36] Paragraph 5 of SD2's report at exh D29 is particularly relevant to the issue of insanity. This is what she said in the report:

F 5. Mangsa dan 4 orang anaknya telah datang ke Malaysia dan telah tinggal serumah dengan penama lebih kurang dua minggu sebelum kejadian seperti yang didakwa. Penama mengatakan yang suaminya tidak memaklumkan kepadanya tentang kedatangan isteri pertama dan anak-anaknya. Penama dikatakan mula berubah sikap menjadi mudah marah beberapa hari kemudiannya kerana merasakan G suaminya lebih menumpukan perhatian terhadap simangsa yang merupakan isteri pertamanya. Penama juga pernah dikatakan pernah bertengkar dengan simangsa.

[37] This is the clearest evidence yet of motive on the part of the respondent. It is hard evidence that she was envious of the attention that her husband was H giving to the deceased. However, the learned judge glossed over this part of the evidence without giving it the proper consideration it deserved. The evidence is crucial because the presence of motive negates the respondent's defence of insanity.

I THE COURT TO CONSIDER ALL EVIDENCE

[38] Under s 182A(1) of the CPC, the duty of the court at the conclusion of the trial is to consider 'all the evidence adduced before it'. This must include all material evidence adduced by the prosecution. It was the learned judge's

finding, based on SD2's oral evidence and her report at exh D29 that at the time the respondent poured the hot oil on the deceased, she did not know the consequences of her act.

[39] The question is whether the learned judge had considered all the relevant and material evidence before arriving at such important finding of fact. Having gone through the appeal record carefully, we are constrained to hold that the learned judge failed to do so and we find that his finding is grossly against the weight of evidence.

[40] With due respect to the learned judge, he seems to have misunderstood his role vis a vis the role of the expert witness SD2. It is clear that he had accepted SD2's expert evidence without question and without testing it against any of the evidence led by the prosecution. In short, he failed to comply with the requirements of s 182A(1) of the CPC.

[41] In the first place, the learned judge failed to appreciate that it was for him and not for SD2 or any other medical expert no matter how eminent to determine whether the respondent was insane at the time she committed the act. SD2's role as a witness was merely to assist the court in arriving at a decision and no more. It was for the learned judge to determine the respondent's mental state or mens rea at the time she committed the act and in so doing he must not rely entirely on SD2's expert evidence.

[42] The learned judge said he had meticulously considered the evidence of the prosecution witnesses but this is not reflected in his grounds of judgment, which clearly shows that his finding on the issue of insanity was based solely and entirely on the evidence of SD2. In the process, he completely failed to test SD2's opinion evidence against SP2's factual evidence which, although circumstantial in nature, established the following facts:

(a) the respondent asked SP2 where her father and her mother were before she carried out the murderous assault. This is evidence of her criminal design;

(b) she boiled oil, which shows preparation for the crime. It was boiled in a rice cooker, which is normally used for cooking rice and not for boiling oil;

(c) she aimed at the deceased's face as proven by the fact that the deceased's face suffered more than 90% burns. This is evidence that she intended to cause maximum harm to the deceased;

(d) after executing her nefarious plan, she threatened to kill SP2 and her siblings if they continued to make noise. This is evidence that she was fully aware of her surroundings; and

A (e) after committing the act, she ran away from the house through the back door. This is evidence that she knew she had done something wrong. In all probability she left after realising that her husband had arrived home.

B **[43]** These strands of circumstantial evidence clearly and undoubtedly show motive and intention on the part of the respondent, thus negating her defence of insanity. The learned judge was duty bound to consider these strands of circumstantial evidence before accepting wholesale SD2's opinion that the respondent was unable to control and think of the consequences of her act when she poured hot oil on the deceased.

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[44] The grounds of judgment also show that the learned judge gave considerable weight to SD2's report at exh D29 in coming to the conclusion that the respondent was insane. He made specific reference to the report at p 42 D of the appeal record where he said:

> Pakar telah melaporkan bahawa tertuduh seringkali mengalami 'psikosis'. Menurut Oxford Dictionary of Current English, definasi 'psychosis' adalah 'severe mental disorder with loss of contact with reality'.
>
> E Oleh itu, saya memutuskan bahawa OKT tidak bersalah di atas pertuduhan membunuh simati atas sebab ketidakwarasan mental serta tidak berupaya memahami tentang akibat dari setiap perbuatan beliau lakukan.

[45] It is important to bear in mind that SP2 was a witness of fact whereas F SD2 was a witness of opinion. Where there is a conflict between the evidence of a witness of fact and a witness of opinion, the evidence of a witness of fact must as a general rule be given more weight. SP2 was at the scene of crime when it happened. SD2 was not, and could not even confirm if the respondent was suffering from BPD at the time she committed the act.

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CONDUCT OF THE RESPONDENT DURING TRIAL

[46] The learned judge further erred in law when he considered the respondent's behaviour in court during the trial as proof that she was insane. This is what he noted at p 37 of the appeal record: H

> Di sepanjang perbicaraan berlangsung, baik di peringkat Pendakwaan mahupun Pembelaan, rumusan yang saya boleh nyatakan adalah OKT ini memanglah seorang yang tidak waras. Ada ketikanya dia kelihatan sedih hingga menangis tanpa sebab. Ada ketikanya pula tersenyum dan ketawa, menjerit dan memperkatakan sesuatu yang tidak pasti akan maksudnya, sehingga terpaksa ditenangkan oleh I anggota polis. Terdapat juga ketikanya OKT menunjukkan isyarat seperti hendak sembelih leher. Malah sewaktu SP14 sedang memberikan keterangan, dijeritnya – 'Polis bodoh' sehingga saya terpaksa mententeramkannya. Ada ketikanya prosiding persidangan terpaksa ditangguhkan kerana OKT bersikap agresif dan meronta-ronta. Ada kalanya dia bertudung kepala, ada kalanya tidak.

[47] With due respect to the learned judge, what he had to determine was whether the respondent was insane at the time she committed the act. How the respondent behaved or conducted herself in court during the trial or at any other time unconnected or remotely connected to the act had nothing to do with that question.

[48] In any case, the respondent had been certified fit to stand trial by SD2 and there is nothing on record to show any change of circumstances. The record does not show that she created any scene while giving evidence and it has not been shown that this normal behaviour was due to the fact that she had taken her medication.

[49] Further, she was able to give evidence under oath without any difficulty and she answered questions intelligently. Neither did she behave abnormally throughout the proceedings before us. Malingering is a possibility that trial judges must be alert to in dealing with cases involving a plea of insanity.

[50] It was therefore wrong for the learned judge to take into account the respondent's behavior during the trial in deciding whether she had succeeded in establishing her defence of insanity. Having regard to the importance the learned judge placed on the respondent's behavior in court during the trial, we cannot discount the possibility that his mind and thus his judgment had been clouded and compromised by such extraneous factor.

LEGAL AND MEDICAL INSANITY

[51] The law is trite that the court is only concerned with legal insanity and not with medical insanity. Section 84 of the Code is concerned with legal insanity and not with medical insanity. The distinction between legal and medical insanity has been explained by the learned authors of *Ratanlal and Dhirajlal's Law of Crimes* (26th Ed) in the following terms at p 307:

> 7. 'Medical insanity' and 'legal insanity'. – There is a good deal of difference between 'medical insanity' and 'legal insanity' and courts are concerned only with the legal and not the medical aspect of the matter. It is not every kind of frantic humour or something unaccountable in a men's action, that points him out to be a mad man, to be excepted from punishment. It is not mere eccentricity or singularity of manner that would suffice the plea of insanity. Abnormality of mind is not by itself sufficient to show that the accused must have acted while of unsound mind. Such exemption can be claimed only when the insane person is incapable of knowing the nature of the act or he is doing either wrong or contrary to law.

[52] Thus, where medical insanity has been established, the defence of insanity under s 84 of the Code is only available where, at the time the accused committed the act, he:

A (a) did not know the nature of his act; or

(b) did not know that what he was doing was wrong; or

(c) did not know that what he was doing was contrary to law.

B **[53]** What a trial judge has to do as the first step in determining whether the defence of insanity has been established is to see whether the accused was medically insane at the time he committed the act. Expert medical evidence is necessary as the question of whether he was medically insane at any particular point in time is in the realm of forensic science. It is not something that the court can determine without the benefit of expert opinion.

[54] Once that threshold is crossed, the next step is for the trial judge to consider whether, by reason of medical insanity, the accused was incapable of knowing the nature of his act or that what he was doing was either wrong or contrary to law. Expert medical opinion is irrelevant as the question of whether the accused was incapable of knowing the nature of his act or that he was doing what was either wrong or contrary to law is a matter to be inferred from the proved facts and circumstances and not from expert medical opinion. It is purely a question of fact for the trial judge to determine.

[55] By focusing his mind on SD2's expert opinion and ignoring completely SP2's factual evidence as to the circumstances leading to her mother's death, the learned judge had fallen into a serious error of law warranting appellate intervention.

STANDARD OF PROOF TO ESTABLISH DEFENCE OF INSANITY

[56] As for the standard of proof required to establish the defence of insanity, the learned judge started off on a wrong footing when he ruled that in order to succeed in her defence the respondent was only required to cast a reasonable doubt in the prosecution case. This is what he said towards the beginning of his judgment at p 31 of the appeal record:

> Sebelum kita menilai serta menganalisa akan isi pembelaan yang disampaikan oleh OKT, elok rasanya kita meneliti akan apakah keterangan yang telah disampaikan oleh OKT bagi menilai pembelaannya bagi menentukan sama ada pembelaan yang dikemukakan diperingkat Pembelaan ini berjaya menimbulkan keraguan yang munasabah bagi mengenepikan kesahihan kes pihak Pendakwaan yang telah diputuskan sebagai 'prima facie' itu. Keraguan yang dimaksudkan itu mestilah merupakan keterangan yang dapat membangkitkan suatu keraguan yang munasabah. Seandainya tugas tersebut dapat dilaksanakan dengan jayanya, maka OKT ini berhak untuk menikmati faedah keraguan tersebut.

[57] He then went on to cite case law on what constitutes a 'reasonable doubt'. This is a clear and serious misdirection on the burden of proof, rendering the whole judgment defective and liable to be set aside. It is trite law that when the defence of insanity is raised the accused must prove the defence on the balance of probabilities and not merely to cast a reasonable doubt in the prosecution case: see *Rajagopal v Public Prosecutor* [1977] 1 MLJ 6 and *Goh Yoke v Public Prosecutor* [1970] 1 MLJ 63.

[58] Given the burden of proof, it was for the respondent to prove that she was legally insane at the time she committed the act and not for the prosecution to prove the reverse that she was not legally insane. In any event the law presumes that a man intends the natural and probable consequences of his act unless he can bring himself within the exceptions accorded by law.

[59] Had the learned judge properly and adequately directed his mind to the all the relevant evidence adduced, he would have found that the respondent had failed to prove her defence of insanity on the balance of probabilities.

[60] Even assuming for a moment that the learned judge was right on the burden of proof, the question to ask is whether the doubt that he entertained was reasonable in all the circumstances of the case. First of all, it is unclear what was the doubt that was lingering on his mind.

[61] At p 34 of the record of appeal, he said that in order to succeed in raising a reasonable doubt in the prosecution case, it was necessary for the respondent to adduce evidence to rebut the prima facie case that had been established against her. We reproduce below what he said:

> Bagi menimbulkan suatu keraguan yang dianggap sebagai keraguan munasabah, pihak Pembelaan perlulah mengemukakan keterangan bagi menyangkal keterangan pihak Pendakwaan yang telah dikemukakan pada tahap prima facie.

[62] Whatever may be the doubt that the learned judge had in mind, what is clear from the above passage is that he was not thinking of rebuttal evidence that was necessary to prove the defence of insanity. In all likelihood, he was thinking of the 'reasonable doubt' test as laid down by Suffian J (as he then was) in *Mat v Public Prosecutor* [1963] 1 MLJ 263; [1963] 1 LNS 82, which has no application to the present case as the respondent had a legal burden and not merely an evidential burden to discharge.

CONCLUSION

[63] For all the reasons aforesaid, we found merit in the appeal by the prosecution and accordingly set aside the order of acquittal and discharge and substituted it with a conviction.

A *Appeal allowed, decision of the High Court set aside, respondent convicted on the charge of murder and sentenced to death.*

Reported by Ashok Kumar

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